Paper No. 14
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THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Showmax, Inc.

Serial No. 75/166,816

Kit M. Stetina of Stetina Brunda Garred & Brucker for Showmax, Inc.

David H. Stine, Trademark Examining Attorney, Law Office 114 (Mary Frances Bruce, Managing Attorney).

Before Cissel, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Showmax, Inc., a California corporation, has filed an application to register the mark "SHOWMAX" for "real estate development in the field of large format movie theaters for others," in International Class 37, and for "large format movie theaters," in International Class 41.[1]

The Examining Attorney has finally refused registration as to the latter class of services on the

ground that the specimens submitted by applicant do not show use of the mark in connection with these services.

Applicant has appealed the final refusal to register. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

It is the Examining Attorney's position that the specimens of record are satisfactory for the Int. Class 37 services (e.g., real estate development services in the field of large format movie theaters), but that they are not acceptable for the recited services in Int. Class 41 (e.g., "large format movie theaters").

The specimen at issue is a tri-fold mailer touting applicant's specialty theater development services. As noted by the Trademark Examining Attorney, applicant's uses of "SHOWMAX" in this mailer/brochure demonstrate use in commerce as to its real estate/theater development services. However, the Trademark Examining Attorney charges that they do not show use of the mark in connection with movie theater services.

International Class 41 includes educational and entertainment services. This, of course, is ultimately the stated goal of the large format movie theaters applicant

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[1] Serial No. 75/166,816 was filed on September 16, 1996, alleging use in connection with the services in both classes

develops. However, one claiming use of the mark in connection with such educational and entertainment services must actually be providing these services – i.e., running an actual brick-and-mortar theater showing movies to members of the public. However, there is currently nothing in the record of this application showing that applicant was indeed operating a movie theater using the service mark, "SHOWMAX," at the time it filed this federal trademark application in 1996, or indeed, that the International Class 41 services outlined in the application have actually been performed by applicant under this service mark at any time.

Section 1(a)(1)(C) of the Trademark Act, 15 U.S.C. §1051(a)(1)(C), requires that applicant furnish specimens of the mark as used. Service mark specimens must evidence use of the mark in the sale or advertising of the recited services. Whether applicant's mark has been used for a particular service is a question of fact to be determined primarily on the basis of the specimens. While the Trademark Examining Attorney provided applicant the opportunity to submit yet another set of substitute specimens supporting such usage, applicant chose to rely upon a brochure directed to its corporate clients. In this

since January 1992.

vein, applicant notes from the text of that brochure that applicant "… provides … operators to ensure that your large format theater project works for you [entrepreneurs wanting to open a large format theater, owners of large commercial sites, etc.]…" Applicant argues: "The plain meaning of this language is that Applicant provides operators for the large format theater, and not simply assistance in finding operators to run the theater." (Reply brief, p.3). Accepting this as true, we find this distinction to be irrelevant to the instant dispute.

Rather, to establish that applicant is itself providing educational and entertainment services in the nature of running large format movie theaters, applicant is required to provide a specimen showing the mark used in the advertisement or sale of this particular service to theater-goers. Acceptable specimens could be as prosaic as a photograph of a movie theater showing the mark on the building or on the marquee, or an advertisement appearing in the entertainment section of a daily newspaper. However, applicant has not submitted such a specimen, and we are compelled to affirm the refusal of the Examining Attorney as to registration of this mark for movie theater services.

Decision: The refusal to register as to the services in International Class 41 is affirmed.

R. F. Cissel

D. E. Bucher

T. E. Holtzman

Administrative Trademark Judges, Trademark Trial and Appeal Board